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No. 98-93

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND LEWIS C. MERLETTI, DIRECTOR OF THE UNITED STATES SECRET SERVICE,
Petitioners,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under Fed. R. Evid. 501, this Court should create a new common-law "protective function privilege" that would authorize law enforcement officers of the United States Secret Service to refuse to testify before a federal grand jury.

PARTIES TO THE PROCEEDING

The parties are the United States, represented by Kenneth W. Starr, Independent Counsel; Robert E. Rubin, Secretary of the Treasury, in his official capacity; and Lewis C. Merletti, Director of the United States Secret Service, in his official capacity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) and the memorandum opinion and order of the district court (Pet. App. 15a-27a) are not yet reported. The orders of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc (Pet. App. 28a-34a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1998, and a petition for rehearing and suggestion for rehearing en banc was denied on July 16, 1998. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE AND STATUTES INVOLVED

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

28 U.S.C. § 535(b) provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency . . . .

18 U.S.C. § 3056(a) provides:

> Under the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect the following persons: (1) The President . . . .

STATEMENT

The United States, represented by the Office of Independent Counsel Kenneth W. Starr ("OIC"), filed a motion to compel officers of the Secret Service's Uniformed Division to testify before a federal grand jury sitting in the District of Columbia. That grand jury is investigating "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential

witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*." Pet. App. 97a. The district court granted the motion to compel, and the court of appeals affirmed.

1. Monica Lewinsky is a former White House intern and employee of the White House's Office of Legislative Affairs. In December 1997, Ms. Lewinsky was placed on a list of witnesses to be called by Paula Jones in the *Jones v. Clinton* litigation and was served with a subpoena requiring her to testify at a deposition in that case. On January 7, 1998, Ms. Lewinsky executed an affidavit representing under penalty of perjury that she had not had a sexual relationship with President Clinton.

This Office subsequently received allegations (i) that Ms. Lewinsky's affidavit was false because she had in fact had a sexual relationship with President Clinton; (ii) that a friend of the President had advised Ms. Lewinsky on how to respond to her subpoena in the *Jones* case, found an attorney to represent her, and helped her find a new job; and (iii) that Ms. Lewinsky had tried to persuade Linda Tripp, a witness in the *Jones* suit, to commit perjury in connection with that case. On January 15, 1998, the OIC presented evidence relating to these allegations to officials of the Department of Justice. The next day, the Attorney General petitioned the Special Division, on an expedited basis, to expand the OIC's jurisdiction. In response to the Attorney General's request, the Special Division conferred jurisdiction on the OIC to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law . . . ." Pet. App. 97a. On January 17, 1998, President Clinton was deposed in connection with the *Jones* case, and was asked a number of specific questions about his relationship with Monica Lewinsky.

From the beginning of its inquiry into this matter, the OIC has received—and continues to receive—numerous and credible reports that Secret Service personnel have

evidence relevant to the investigation. Specifically, the OIC is in possession of information that Secret Service personnel may have observed evidence of possible crimes while stationed in and around the White House complex.

2. On January 27, 1998, representatives of the OIC met with representatives of the Secret Service to discuss the issue of testimony by Secret Service employees. The Secret Service asserted that some testimony by its personnel would be covered by a "protective function privilege."

On April 10, 1998, the United States, represented by the OIC, moved to compel Secret Service witnesses to testify regarding the matters as to which they had previously invoked the proposed "protective function privilege." In an opinion and order entered May 22, 1998, Chief Judge Norma Holloway Johnson granted the motions to compel. Pet. App. 15a-27a.

Chief Judge Johnson began her analysis by describing the nature of the privilege that the Secret Service had asserted. The court observed that "[n]one of the questions at issue relate to the protective techniques or procedures of the Secret Service." Pet. App. 15a.

Turning to the decisions of this Court that govern the creation of proposed new privileges, the district court held that Fed. R. Evid. 501 and this Court's precedents require courts to consider "1) whether the asserted privilege is historically rooted in federal law; 2) whether any states have recognized the privilege; and 3) public policy interests." Pet. App. 16a-17a (citations omitted). After describing the traditional reluctance of the federal courts to create new evidentiary privileges, Chief Judge Johnson briefly summarized this Court's recent decisions regarding the subject, noting that new privileges are far more frequently rejected than recognized.

The district court next considered the history of the proposed "protective function privilege" in federal law. Recognizing that no court has ever adopted the privilege,

and finding no constitutional, statutory, or common-law basis for it, the district court proceeded to analyze the two federal statutes relevant to the issue: 18 U.S.C. § 3056(a) and 28 U.S.C. § 535(b). Section 3056(a), the court observed, requires the President and Vice President to accept the protection of the Secret Service, but does not create an evidentiary privilege for its employees. Section 535(b), in turn, imposes an affirmative duty on Executive Branch personnel to report "any information" regarding criminal activity by government officers and employees to the appropriate supervisory authority (normally, the Attorney General). The district court's analysis of this latter statute in particular led it to conclude that "a protective function privilege would contradict the goal of section 535(b), which is to have executive branch employees report criminal activity by government officials." Pet. App. 19a.

Chief Judge Johnson noted that the Secret Service has never attempted to assert the "protective function privilege" on any of the various occasions in which its employees have testified in the past. Accordingly, "the Secret Service's own history, the lack of any constitutional or statutory support for the claimed privilege, and the federal case law regarding newly asserted privileges under Rule 501 all weigh against recognizing the privilege." Pet. App. 21a.

Turning to the history of the proposed privilege in state law, Chief Judge Johnson observed that "[n]o state has ever recognized a protective function privilege or its equivalent," and that this "absence of any state support for the privilege not only militates against recognizing [it], but also distinguishes it significantly from the patient-psychotherapist privilege recognized [by the Supreme Court] in *Jaffee*." Pet. App. 21a. The fact that no state has ever adopted a "protective function privilege" for its governor, the court reasoned, indicates that the "reason and experience" that Fed. R. Evid. 501 requires for the

creation of a new privilege are lacking. Pet. App. 21a-22a.

The district court also examined the public policy justifications for the "protective function privilege" advanced by the Secret Service, including its argument that if testimony were compelled from its employees, "current and future Presidents would inevitably distance themselves from Secret Service personnel, thereby endangering the life of the Chief Executive." Pet. App. 22a. The court acknowledged that "[t]he physical safety of the President of the United States is clearly of paramount national importance." *Id.*

After carefully weighing the Secret Service's policy and fact-based arguments, however, the district court rejected them. "While the concerns of the Secret Service are legitimate, the Court is not convinced that compelling Secret Service personnel to testify before a grand jury regarding evidence of a crime would place Presidents in peril." Pet. App. 22a-23a. The basis for this conclusion was the district court's refusal to credit "the suggestion that the possibility that agents could be compelled to testify before a grand jury will lead a President to 'push away' his protectors," and its concomitant finding that "[w]hen people act within the law, they do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury." *Id.* at 23a. Moreover, the court reasoned, it is by no means clear that a President "would push Secret Service protection away if he were acting legally or even if he were engaged in personally embarrassing acts," because such actions "are extremely unlikely to become the subject of a grand jury investigation." *Id.* In short, "[t]he claim of the Secret Service that 'any Presidential action—no matter how intrinsically innocent—could later be deemed relevant to a criminal investigation' is simply not plausible." *Id.* (citation omitted).

Finally, the district court noted that previous published accounts of candid observations of Presidents have not

caused them to push their protectors away. Pet. App. 23a. Presidents have a "very strong interest" in protecting their own physical safety, the court found, and the Secret Service's educational process with regard to incoming Chief Executives will continue to instruct them of "the vital importance of close proximity" and the corresponding danger of any ill-advised "pushing away." *Id.* at 24a.

3. The court of appeals affirmed.[1] The court began "with the primary assumption that there is a general duty to give what testimony one is capable of giving." Pet. App. 5a (citations omitted). Thus, privileges " 'are not lightly created nor expansively construed.' " *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

The court emphasized that, under this Court's case law, a party seeking judicial recognition of a new evidentiary privilege under Rule 501 must demonstrate "that the proposed privilege will effectively advance a public good." Pet. App. 6a. "In other words, the Secret Service must demonstrate that recognition of the privilege in its proposed form will materially enhance presidential security by lessening any tendency of the President to 'push away' his protectors in situations where there is some risk to his safety." *Id.* As to newly asserted privileges, "[e]ven in cases where the proposed privilege is designed in part to protect constitutional rights, the Supreme Court has demanded that the proponent come forward with a compelling empirical case for the necessity of the privilege." *Id.* at 6a-7a.

The court then turned to the policy arguments for and against the asserted "protective function privilege." Notwithstanding the Secret Service's predictive judgments about the behavior of the President, judges "must also assure [them]selves that those conclusions rest upon solid

[1] This Office, on behalf of the United States, filed a petition for a writ of certiorari before judgment. The Court denied that petition without prejudice on June 4, 1998. *United States v. Rubin*, 118 S. Ct. 2080 (1998).

facts and a realistic appraisal of the danger rather than vague fears extrapolated beyond any foreseeable threat." Pet. App. 7a (quotation omitted). Here, the court stated, the Secret Service's argument was based upon nothing more than speculation. *Id.* at 8a.

The court of appeals noted, moreover, that two of the three former Presidents who have publicly expressed their views (Presidents Ford and Carter) have concluded that there should be no such privilege in criminal proceedings. Pet. App. 8a. The court also concluded that the President would not be inclined to push away his protectors. He is under a statutory duty to accept such protection, *see* 18 U.S.C. § 3056(a), and "the President has a profound personal interest in being well protected." Pet. App. 8a.

The D.C. Circuit went on to observe that the Secret Service's argument was "weakened" by the form of the proposed privilege. Pet. App. 9a. "An agent may not testify about the conduct of the President or anyone else unless the agent recognizes that conduct as felonious when he is witnessing it; a felony made apparent to the agent only by subsequent events . . . must remain secret." *Id.* The court explained that the proposed exception for contemporaneously recognizable felonies undermines the policies that the Secret Service has asserted and thus "strikes a strange balance between the competing goals of providing sound incentives for the President and facilitating the discovery of truth." *Id.* The court continued:

> On the one hand, because the President cannot know whether an agent will realize he is witnessing the commission of a felony—which depends in part upon how much the agent knows about prior events—the President will have to discount substantially the value of the protective function privilege (and thus perhaps be tempted to distance himself from his protectors all the same). On the other hand, the exception would prohibit testimony (and thus thwart the search for truth) even in cases where the evidence, viewed in the light of subsequent events, would supply a key element in the proof of a serious crime.

Id.

The D.C. Circuit also found it significant that the Secret Service does not require agents to sign a confidentiality agreement, which means that the Secretary cannot ensure the confidentiality of information held by former agents. "If preventing testimony is as critical to the success of its mission as the Secret Service now claims, it seem anomalous that the Service has no better mechanism in place to discourage former agents from revealing confidences or at least to alert the Secretary when testimony is about to be given." Pet. App. 10a.

The efficacy of the proposed privilege, the court found, was also "undermined" in that it was not vested in the President, whose behavior the privilege is designed to affect. The court stated that "we know of no other privilege that works that way. If the person whose conduct is to be influenced knows that the privilege might be waived by someone else, the effect of the privilege in shaping his conduct is greatly diminished if not completely eliminated." Pet. App. 10a.

Furthermore, an incumbent President's ability to control the privilege "would end when the President leaves office." Pet. App. 10a. And thus the privilege cannot serve its asserted purpose because "disclosures by Secret Service agents after the President leaves office [may] be as feared as disclosures during his incumbency." *Id.* at 11a.

The court found yet another anomaly in that "the greatest danger to the President arises when he is in public, yet the privilege presumably would have its greatest effect when he is in the White House or in private meetings." Pet. App. 11a. In addition, the court recognized that Secret Service agents had testified in the past and "disclosed observations from their protective experiences

in books, apparently without causing Presidents to distance themselves from their protectors." *Id.*

The court also pointed to Section 535(b) of title 28, which requires that any "information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported" to the appropriate federal law enforcement official. The court found that, at a minimum, Section 535(b) "evinces a strong congressional policy that executive branch employees must report information 'relating to violations of title 18 involving Government officers and employees.' That policy weighs against judicial recognition of the privilege proposed here." Pet. App. 13a.

4. The court of appeals denied a petition for rehearing and a suggestion for rehearing en banc. Pet. App. 29a. The court explained that "no judge on the court has even requested a vote on the Justice Department's suggestion for rehearing *en banc*." Pet. App. 36a.

The court also denied the Secret Service's application for a stay pending the filing of a petition for a writ of certiorari. The court stated that the Secret Service "has not made a sufficient showing that irreparable harm will result unless a stay and an order are issued, and it has not made a sufficient showing that it will ultimately prevail in establishing the privilege it alleges." Pet. App. 35a-36a. The harm asserted is "future harm, depending on a prediction about what the President will do in the absence of the privilege." *Id.* at 36a. But the Court recognized: "If harm of the sort the Department envisions is now occurring, it therefore must be because the President does not believe the Supreme Court will sustain the privilege. Neither a stay nor an order under the All Writs Act can alter or prevent that alleged harm. Testimony today by Secret Service agents regarding past events cannot change our ruling. And such testimony cannot affect how the Supreme Court will rule." *Id.*

ARGUMENT

The novel privilege asserted by the Secret Service has been thoroughly analyzed by the district court and by the court of appeals. All four judges to consider the privilege claim have flatly rejected it. Indeed, despite the Secret Service's forcefully worded suggestion for rehearing en banc, not a single judge on the D.C. Circuit even called for a vote. This deafening silence refutes petitioners' speculation that the panel's ruling would result in a serious risk of harm. Pet. App. 36a.

There is a good explanation for the unanimity of the federal judges who have examined the question. As a matter of law, history, and policy, the Secret Service's claim is meritless. No case, statute, regulation, rule, or agency opinion—*ever*—has concluded that there is (or even should be) a protective function privilege. And this Court has consistently refused to recognize privileges unrooted in historical or contemporary practice. That is particularly true where, as here, a federal statute affirmatively requires the disclosure of information that falls within the asserted common-law privilege. *See* 28 U.S.C. § 535(b).

What is more, the relevant policy considerations point decisively against this previously unheard-of privilege. Secret Service officers and agents are law enforcement officers sworn to enforce and uphold the law. They work for the people of the United States, who have a bedrock interest in detecting and prosecuting federal crimes, particularly crimes committed by high government officials. The speculation that Presidents might "push away" Secret Service officers and agents absent a privilege in criminal proceedings assumes that Presidents will both violate their legal obligation to accept protection and risk their own lives unnecessarily. It also rests on the discredited notion that Presidents can prevent other government officials from testifying about the President's acts and communications. *Cf. Nixon*, 418 U.S. at 683.

For those reasons, the petition should be denied.

I

At the outset, we emphasize the compelling national interest in prompt completion of this grand jury investigation. All parties agree: This criminal investigation should be concluded sooner rather than later. At this time, moreover, there is a particularized need for expedition.

The need for expedition is of greatest importance with respect to the Secret Service's stay application. As the court of appeals specifically explained, two separate reasons demonstrate why there is no basis for a stay (even if the Court determines that the legal question presented in the petition for a writ of certiorari warrants review).

First, there is no possibility of any harm, much less irreparable harm, if a stay is denied. If the point of this litigation is what the Secret Service says it is—to obtain a definitive determination that there is a "protective function privilege"—then denial of a stay causes no harm at all. Whether this Court denies or grants certiorari, the Secret Service soon will have a definitive ruling. And we have no intention of taking any action that would cause this litigation to become moot. We have not issued (and pending completion of the appellate process, will not issue) subpoenas to all of the individuals whose testimony is at stake in the motion to compel. Thus, denial of the stay will in no way cabin the ability of this Court to review the decision of the court of appeals.

Moreover, at least until this Court issues a final ruling, we will not question any officers and agents about on-duty "protective-function" observations that occur on or after this date. As a result, there could not be *any* conceivable current Presidential pushing away caused by denial of the stay—even if the petition for certiorari is granted.

Second and independently, we respectfully suggest that there is no significant possibility of reversal of the D.C.

Circuit's decision. *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). As the D.C. Circuit stated, "the Justice Department's likelihood of success before the Supreme Court is insufficient to warrant further delay in the grand jury's investigation" and "it has not made a sufficient showing that it will ultimately prevail in establishing the privilege it alleges." Pet. App. 36a. The lack of merit is important, for "there is no good reason for allowing a stay of the judgment below if it is certain to be affirmed, even if the case is worthy of Supreme Court review because of . . . the public importance of the question presented." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 693 (1993) (emphasis added). Therefore, even if the Court determines that this issue is of sufficient public importance that it must grant plenary review, there nonetheless is no reasonable prospect of reversal and thus no basis for a stay.

For both of those two alternative and independent reasons, the Court should deny the Secret Service's application for a stay—regardless whether it grants the petition for a writ of certiorari.

II

The petition should be denied because of the need for expeditious completion of this investigation and because the privilege asserted in this case lacks any merit. Three separate sources of law contravene the privilege claim: this Court's traditional considerations under Federal Rule of Evidence 501, the statutory disclosure obligations imposed by Section 535(b) of title 28, and an assortment of compelling public policy considerations. Moreover, as the court of appeals emphasized, the Secret Service's privilege claim on its own terms is internally inconsistent and logically incoherent. For those reasons, further review is unwarranted.

As the Secret Service notes, we previously sought certiorari before judgment. We did so in order to expedite

this investigtaion and because we firmly believed that the Secret Service would not back down from seeking this Court's review even in the face of a decisive defeat in the court of appeals. Our fears were well-founded, for the Secret Service has persisted in championing a privilege claim that has been roundly rejected in the court of appeals. The Solicitor General, on behalf of the Secret Service, nonetheless implies that we are somehow estopped from opposing this petition because of our earlier petition for certiorari before judgment. Pet. 12. He is wrong. A denial of certiorari from this Court, coupled with *no* prospect of any further lower court litigation, *will* constitute the "final ruling" with "moral authority and public credibility" that will end this meritless privilege litigation. *Cf.* Pet. 13. And all we have ever sought (unlike the Solicitor General, who did not support certiorari before judgment for reasons that remain unclear) is the quickest possible *final* ruling. At this point, that means a denial of the petition.

1. Under Rule 501, privileges are "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." Under this common-law standard, "courts have historically been cautious about privileges," *Nixon*, 418 U.S. at 710 n.18, because they obstruct the search for truth and "contravene the fundamental principle that the public has a right to every [person's] evidence." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (quotation omitted). A privilege applies only where it is "necessary to achieve its purpose," *Fisher v. United States*, 425 U.S. 391, 403 (1976), and "promotes sufficiently important interests to outweigh the need for probative evidence," *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996) (quotation omitted).

This Court has emphasized the important distinction under Rule 501 between determining the scope of an existing privilege, and creating an altogether new one. *See Swidler & Berlin v. United States*, No. 97-1192, 1998 WL 333019, at *7 (June 25, 1998). This Court's privilege decisions establish that the federal courts should not recognize a new privilege under Rule 501 unless it is (i) supported by important public policy considerations and (ii) either historically rooted in law or accepted by a vast majority of States. Thus, the Court has embraced only one new evidentiary privilege since the adoption of Rule 501, and has rejected numerous others. *See Jaffee*, 518 U.S. 1 (recognizing psychotherapist-patient privilege);[2] *University of Pennsylvania*, 493 U.S. 182 (rejecting privilege for academic peer review materials); *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) (rejecting accountant work-product privilege); *United States v. Gillock*, 445 U.S. 360 (1980) (rejecting privilege for "legislative acts" by state legislator); *Herbert v. Lando*, 441 U.S. 153 (1979) (rejecting "editorial process privilege").

The "protective function privilege" does not meet these requirements for a new federal privilege. It has never been recognized, cited, or even discussed by any legal authority. Indeed, as far as we are aware, nothing resembling the "protective function privilege" has ever been recognized in any body of law. It also is conspicuously absent from the list of privileges proposed to Congress in 1974, and upon which this Court relied in *Jaffee*, 518 U.S. at 13-14, and *Gillock*, 445 U.S. at 367-68.

In addition, the law enforcement officers who protect state governors and other officials have been called upon to testify about their protectees. *See, e.g., Mecham Aide Testifies at Impeachment Trial*, N.Y. Times, Mar. 3, 1988, at A19. The law enforcement responsibilities of those state law-enforcement bodies that are analogous to

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[2] In recognizing a new federal psychotherapist privilege, the Court in *Jaffee* relied on the fact that "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege," reasoning that the "consensus among the States" counseled in favor of Rule 501 recognition. *Jaffee*, 518 U.S. at 12. Moreover, the privilege had been one of the nine privileges contained in the proposed Federal Rules.

the Secret Service thus provide no support to the Secret Service's claim.

In this case, as in *University of Pennsylvania* and many others, the asserted "protective function privilege" is thus unavailing because it has no "historical or statutory basis." 493 U.S. at 195. The Secret Service should turn to Congress with its policy arguments, for this Court has oft stated "[t]he balancing of conflicting interests" when the privilege lacks historical or state law support "is particularly a legislative function." *Id.* at 189.

2. Even apart from its failure to satisfy traditional Rule 501 requirements, the Secret Service's privilege claim fails for a separate reason. Section 535(b) of title 28 requires that "[a]ny information" that government officers such as Secret Service personnel possess "relating to violations of title 18 involving Government officers and employees shall be expeditiously reported" to the proper federal law enforcement official (in this case the Independent Counsel).[3] The official undertaking such an investigation is to have "*complete cooperation* from the department or agency concerned." H.R. Rep. No. 83-2622 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3552.

The import of Section 535(b) is clear: The chief federal law-enforcement officer (here, within his limited jurisdiction, the Independent Counsel, *see* 28 U.S.C. § 594(a)) is to receive complete cooperation and free access to all units of the Executive Branch, unless some overriding constitutional privilege applies. A statute such as Section 535 that sets forth a right of access or disclosure precludes judicial recognition of a contrary *common-law*

[3] Section 535(b) requires that the information in question be reported to the Attorney General unless "the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law." 28 U.S.C. § 535(b)(1). Here, the responsibility to perform this investigation has been assigned to the Independent Counsel under 28 U.S.C. § 594(a) and the Special Division's order of January 16, 1998.

privilege. In *University of Pennsylvania*, for example, Title VII authorized government access to information relevant to a discrimination charge. The Court rejected a peer-review privilege claim, stating that the Title VII provisions "[o]n their face . . . do not carve out any special privilege relating to peer review materials." 493 U.S. at 191.

Similarly, in *Arthur Young*, Section 7602 of title 26 granted the IRS a right of access to an accountant's papers. The Court rejected an accountant's work-product claim, stating that "the very language of § 7602 reflects . . . a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry. . . . If the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, not this Court, to make." 465 U.S. at 816-17.

Arthur Young and *University of Pennsylvania*, when combined with Section 535's text and history, flatly refute the Secret Service's *common-law* privilege claims.

Even if Section 535(b) were not dispositive, it at least "evinces a strong congressional policy that executive branch employees must report information 'relating to violations of title 18 involving Government officers and employees.'" Pet. App. 13a. As the court of appeals explained, "[t]hat policy weighs against judicial recognition of the privilege proposed here." *Id.* Similarly, the district court found that "a protective function privilege would contradict the goal of section 535(b), which is to have executive branch employees report criminal activity by government officials." Pet. App. 19a.

Moreover, Section 3056(a) of title 18 authorizes the Secret Service to protect the President and requires the President to accept its protection. As the district court observed, Congress mandated protection of the President but has not created a "protective function privilege," further supporting the conclusion that Section 535(b) should be interpreted according to its terms. Pet. App. 18a.

3. Turning to policy, the Secret Service's principal argument for recognition of its privilege is that testimony by its personnel would inevitably cause a President to push away his security detail. That speculative prediction has found no adherents in the federal judiciary. Even apart from the decisive flaws in the Secret Service's argument (the lack of historical or contemporary support for the privilege and the obligation imposed by Section 535), an impressive list of compelling policy and logical reasons convincingly demonstrates that the Secret Service's speculative argument lacks merit.

First, as the court of appeals stated, Section 3056(a) *requires* that the President accept the proximity-based protection that the Secret Service is obliged to give him. Pet. App. 8a. A common-law privilege should not be created out of whole cloth on the assumption that the President otherwise would flout a statutory obligation.

Second, a President has a strong personal interest in his own life. As Chief Judge Johnson explained, therefore, it is hard to understand why a law-abiding President would push away his protectors in situations where there is a plausible fear of attack simply because of the lack of a protective function privilege. Pet. App. 24a.

Third, as the court of appeals explained, the President has ample privacy within the White House compound—the place where he is most likely to commit crimes or acts relevant to a criminal investigation or prosecution. Pet. App. 11a. And historically, the dangers to the President have increased when he is in crowd situations outside the White House. So the lack of the "protective function privilege" would not meaningfully deter the President who wished to take care to commit criminal or wrongful acts in the White House.[4]

[4] The Secret Service's coded suggestion that Congress has mandated "unremitting intrusion into the most intimate aspects" of the President's life is wrong. Pet. 4.

Fourth, the lack of a "protective function privilege" should have no effect on the President who "act[s] within the law," for such persons "do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury." Pet. App. 23a. Indeed, the district court found the contrary argument "simply not plausible." *Id.*

Fifth, numerous officers and agents have recounted what are now claimed to be "privileged" observations in widely published books. Pet. App. 11a, 23a. Yet we are not aware of, and the Secret Service has not offered, any indication that any of these published accounts has caused a President to distance himself from his protectors.

Sixth, the Secret Service does not require Secret Service personnel to sign confidentiality agreements as a condition of employment. *See* Pet. App. 9a-10a. Thus, a retired officer has no legal restriction preventing him from disclosing information, even if there were a protective function privilege. The lack of such an agreement simply exposes the contrived, tailored-for-the-occasion nature of the privilege claim that is preventing disclosure of highly relevant Secret Service testimony in this criminal investigation.

Seventh, the President controls the privilege only while he is in Office. Termination of control over the privilege after the President leaves office—but while the President is alive and subject to criminal liability—shows that the privilege cannot meet its stated goals even if it were recognized. *Cf. Swidler & Berlin*, 1998 WL 333019, at *5 ("Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."). This fact "weakens the claim that the privilege in the form proposed by the Secret Service will do anything to diminish the President's incentive to keep his protectors at a distance." Pet. App. 10a-11a.

Eighth, two former Presidents (Ford and Carter) have stated that there should be no protective function privi-

lege in criminal proceedings. *See* Pet. App. 8a. These statements by former Presidents sharply undercut the Secret Service's argument that Presidents would push away without this asserted privilege. (Former Attorneys General Bell, Meese, Thornburgh, and Barr also filed an amicus brief in the court of appeals emphatically opposing the asserted privilege.)

Ninth, under the Secret Service's theory, observations of the President become more sacrosanct than the constitutionally protected Presidential communications and deliberations that fall within the executive privilege. Given that the presidential communications privilege was found by this Court to be "fundamental to the operation of Government," yet overridden by the need for relevant evidence in criminal proceedings, the Secret Service's proposed privilege would create an irrational asymmetry in the law. *Cf. Nixon*, 418 U.S. at 707-13.

Tenth, under the Secret Service's theory, testimony about a President who has committed a contemporaneously recognizable felony would *not* be privileged whereas testimony about observations that constitute mere *evidence* of a felony would be. But if testimony about contemporaneously recognizable felonies will not cause "pushing away," how can testimony about evidence of felonies not recognized as such (or of misdemeanors) cause pushing away? Pet. App. 9a. In the end, there is not much to say about this gerrymandered privilege except that it strikes what the court of appeals charitably called "a strange balance between the competing goals of providing sound incentives for the President and facilitating the discovery of truth." *Id.*

In sum, as to policy, the proposed privilege would have the effect of forcing sworn law enforcement officers to remain silent while in possession of evidence that could affect serious federal criminal proceedings. And it would construct a rule premised on the assumption that a President of the United States, bound by his constitutional

oath, has a legitimate interest in engaging in criminal activity without fear of disclosure by his Secret Service personnel. Thus, even apart from the dispositive legal flaws in the Secret Service's privilege, it also lacks a coherent policy rationale.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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